

February 6, 2006

The Honorable Cathy McMorris
Chair
Task Force on Improving NEPA
Committee on Resources
1324 Longworth House Office Building
Washington, D.C. 20515

Dear Representative McMorris:

On behalf of the Western Business Roundtable, I am pleased to submit these recommendations in response to the "Initial Findings and Draft Recommendations" released by the Task Force on Improving the National Environmental Policy Act (NEPA).

We want to thank you, House Resources Committee Chair Richard Pombo and the other Task Force Members and staff for the thoughtful approach you have taken in what has been an exhaustive review and analysis of NEPA. Your leadership on this important issue is very much appreciated.

Like you, the members of the Roundtable recognize that the original intent of NEPA remains laudable: to have a reasonable process to evaluate how best to carry out human activities -- on lands requiring federal permits or other approvals -- with appropriate consideration given to the effects those activities may have on the environment. Unfortunately, over the years that Congressional intent has become distorted as the statute has increasingly been used, by those opposed to sustainable economic growth and prosperity, as a tool to delay and block reasonable economic activity on America's lands.

The Roundtable believes that the Task Force's draft report is evidence that, with careful and thoughtful effort, the NEPA statute can be improved to work better for both the nation's economy and its environment. We appreciate the opportunity you have afforded us to provide further input on the draft recommendations and would be glad to discuss or clarify our suggestions as needed.

COMMENTS ON GROUP 1 RECOMMENDATIONS: ADDRESSING DELAYS IN THE PROCESS

- **Prevent redundant or duplicative NEPA analyses.**

Any successful NEPA streamlining effort must address, with specificity, the problem of redundant or duplicative NEPA analyses. Today, a single tract of land can be put through multiple tiers of NEPA review, each requiring months or years to complete. The Report's recommendation, while providing more structure to the process, falls short of fully addressing this problem.

A better system would be to have a Planning Environmental Impact Statement on the front end, which creates Categorical Exclusions (CEs) for certain, defined activities. A non-exclusive list of specific CEs for certain defined activities in all planning documents should be provided. Only projects that do not fit those criteria should be forced to be put through a project-specific EA or EIS.

Further, the initial federal NEPA review should be considered a complete, cooperative venture so that, by statute, further review of a particular project under federal, state or local NEPA processes is not required.

- **Redefine "Major Federal Actions"**

We support your effort to define "Major Federal Actions" to include only new or continuing projects that would require substantial planning, time, resources or expenditures. The definition would be further enhanced, affording greater certainty, by providing a specific definition of "substantial."

- **Add Mandatory Timelines for Completion of All NEPA Documents**

We applaud the Task Force's recommendation that deadlines be required for the completion of Environmental Impact Statement (EIS) and Environmental Assessment (EA) documents. This recommendation would be strengthened by the inclusion of a specific time limit for the CE process. Further, all involved agencies and states should be bound by these time limits.

We also support the Task Force's recommendation that analyses not concluded by these timeframes should be considered completed.

The recommendation that agencies be able to receive a short extension should include a limit of no more than one extension for each EIS, EA, or CE process.

- **Create Unambiguous Criteria for Use of CEs, EAs, and EISs.**

We appreciate the Task Force's recommendation that a clear differentiation between the requirements for EAs and EISs be provided.

We also agree that NEPA should be amended to state that temporary activities, or other activities where the environmental impacts are clearly minimal, are to be evaluated under CEs. In order to prevent redundant or duplicative NEPA analyses, a non-inclusive list of specific CEs for certain defined activities should be provided. This list should include, for example:

- Existing projects that simply need a permit or authorization renewal;
- Activities that are non-significant and temporary. For example, the oil and gas and mining industries have strong track records of successfully reclaiming lands to a condition that is equal to or better than before the exploration, development, and/or production activity occurred;
- Where a project proponent has already completed mitigation or has included sufficient mitigation in the proposed action to avoid significant impacts that would normally require preparation of an EIS or, in some cases, even reduce those impacts below the threshold for preparation of an EA.

- **Establish Specific Criteria for Supplemental NEPA Documentation**

We endorse the Task Force's recommendation to limit supplemental documentation.

- **Increase the use of “programmatic documentation” to decrease the need for EISs.**

The Report has not addressed the issue of “programmatic documentation” and we strongly advocate for this important consideration. Too often, federal agencies become overwhelmed by the volume of NEPA activity at the state and federal field office levels because of an increased use of EISs over the simpler, more cost-effective EAs. The agencies need guidance aimed at reducing the number of EISs prepared.

A good way to accomplish this would be through increased use of programmatic NEPA documentation. Many issues common among resource development activities could be assessed programmatically in the context of federal land managers’ Forest Plans or Land and Resource Management Plans. A few examples include: identification of mining districts; the inclusion of wind generation resource monitoring; basic mine closure techniques, etc.

Likewise, please consider umbrella environmental reviews. For example, individual national forests or regions should have a broad, NEPA-compliant, catastrophic loss policy that lays out the consequences of salvaging damaged public resources (i.e. burned, insect-killed or blown down trees). When a fire or other catastrophe occurs, the federal agency should be ready to take action on the ground as soon as it is physically possible.

COMMENTS ON GROUP 2 RECOMMENDATIONS: ENHANCING PUBLIC PARTICIPATION

- **Give Weight to Local Comments**

The Roundtable applauds the intent of the Task Force’s recommendation that directs the Council on Environmental Quality (CEQ) to prepare regulations to assure that the issues and concerns raised by local interests are weighted more than comments from outside groups and individuals who are not directly affected by a specific proposal.

The Roundtable believes that the public comment process is integral to NEPA and that agencies need to give particular consideration to those comments from local, state and regional entities that will actually be affected by a decision. In that regard, agencies need to mitigate skewed comments resulting from organized letter writing campaigns

by focusing more on the quality and substance of the comments, rather than their quantity.

Moreover, Congress should provide improved guidance to agencies for evaluating a petitioner's standing in the proceedings to ensure comments focus on the specific issues and alternatives under consideration.

- **Limit Length of EIS Documents**

The Roundtable shares the Task Force's opinion that the EIS page limits set forth in 40 CFR 1502.7 should be codified. These limits would normally be less than 150 pages with a maximum of 300 pages for complex projects.

COMMENTS ON GROUP 3 RECOMMENDATIONS: ASSURING BETTER INVOLVEMENT FOR STATE, LOCAL AND TRIBAL STAKEHOLDERS

- **Allow State Environmental Review Processes to Satisfy NEPA**

The Roundtable agrees with the recommendation that would direct CEQ to write regulations to allow, in cases where state environmental reviews are functionally equivalent to NEPA requirements, those state requirements to satisfy NEPA requirements.

COMMENTS ON GROUP 4 RECOMMENDATIONS: ADDRESSING LITIGATION ISSUES

- **Provide meaningful litigation reform.**

While the Roundtable recognizes the need to create a "citizen suit" provision, we recommend that this provision be narrowly constructed. Crucial here is a "standing" provision that requires the citizen's nexus to the proposed federal action to be substantial before standing to sue can be established.

The Report's recommendation that parties must be involved throughout the process in order to have standing in an appeal helps to narrow this provision and would go far in providing meaningful litigation reform.

The Roundtable also believes that judges generally need more specific guidance with which to evaluate and rule on NEPA decisions. Judges should be encouraged to expedite their decision making process, particularly when faced with a NEPA review that is time sensitive.

Data from CEQ's NEPA Litigation Surveys indicate that during the period of 2002-2004, over half of the EIS documents finalized in this interim were litigated. This suggests that project proponents face at least a 50-50 chance of having NEPA documents pertaining to their projects challenged. The Report indicates that number of injunctions that resulted from these challenges were small. There is little comfort in this small percentage. Project proponents and federal agencies expend enormous resources in responding to NEPA lawsuits and threats of NEPA lawsuits.

- **Make CEQ the “Clearinghouse” for Monitoring Court Decisions**

The Roundtable concurs with the recommendation that CEQ be charged with monitoring court decisions that affect procedural aspects of preparing NEPA documents. CEQ should analyze the effects of a judicial proceeding or agency administrative decision that mandates certain requirements. CEQ should advise appropriate federal agencies of its applicability.

COMMENTS ON GROUP 5 RECOMMENDATIONS: CLARIFYING ALTERNATIVES ANALYSIS

- **More Narrowly Define “Reasonable Alternatives” by Requiring Complete Economic Impacts and Technical Feasibility Analyses**

The Roundtable applauds the recommendation requiring that “reasonable alternatives” analyzed in NEPA documents be limited to those which are economically and technically feasible. We believe that this recommendation should be further bolstered by requiring that an unbiased and comprehensive analysis be performed and that the revenue that could be earned by the action be included. Without adequate economic analyses, the public is denied critical information.

Further, the “reasonable alternatives” analysis process can be strengthened by streamlining the number of alternatives proposed by agencies. Opponents to development routinely use the NEPA process to delay and expand the scope of environmental analysis, all with an eye towards rendering proposed activities uneconomic. One tactic often used

is to force federal officials to consider so many alternatives, such as different locations and project sizes, that the process is delayed and expenses are increased.

Analyzing numerous alternatives often is particularly ill-suited for energy and mineral development activities. Geological factors largely dictate where such activities can occur. Satisfying the current alternative analysis requirement ends up being a time-consuming paper exercise that does not add much value to the environmental analysis.

NEPA reforms should ensure the alternatives proposed by an agency are reasonable and are focused on the actual purpose and needs of the project under consideration. This will ensure that only the most reasonable, technologically achievable and economically feasible alternatives are considered.

- **Require That Alternatives Analyses Include Consideration of Impacts Caused by No Action**

The Roundtable agrees with the recommendation to amend the “no action alternative” directive to require rejection of this alternative if, on balance, the impacts of not undertaking a project or decision would outweigh the impacts of executing the project or decision.

- **Make Mitigation Proposals Flexible**

The Roundtable is concerned about the potential lack of flexibility in mitigation requirements where a private applicant is involved. As stated in the Report, a private applicant may not adjust mitigation proposals because of new data and information without the threat of legal action. This is counter-productive.

We suggest that the Task Force’s recommendation should be clarified to provide a structured mitigation proposal amendment process that allows the relevant governmental agency reasonable discretion to adjust mitigation requirements, with due regard for the economic effects of any change to the existing approval. Proposed amendments to mitigation requirements should be allowed only from the private party and/or agency involved. It should also be clear who would have the power to grant amendments and bring legal action to enforce.

- **Require Analyses to Include “Statement of Energy Effects”**

President Bush's Executive Order No. 13211 requires that any agency that takes an action with an adverse effect on the supply of domestic energy resources must submit a "Statement of Energy Effects" to the Office of Management and Budget (OMB). The Order directs agencies to consider the effects of proposed actions on the supply, distribution and use of energy. NEPA reform should call for this to be codified so that impacts on energy production are properly considered and are conveyed to the Administration and the public for all alternatives considered in a NEPA process.

In addition, all NEPA decisions should evaluate compliance with the Mining and Mineral Policy Act of 1970 (30 U.S.C., Section 21(a) and The Federal Land Management Act of 1976 (43 U.S.C., Section 1701(a)(2), both of which mandate that the federal government foster development of economically sound and stable domestic mining, minerals, metal and mineral reclamation industries.

COMMENTS ON GROUP 6 RECOMMENDATIONS: IMPROVING FEDERAL AGENCY COORDINATION

- **Encourage More Consultation with Stakeholders**

The Roundtable supports the recommendation to direct CEQ to promulgate regulations to encourage more formal consultation with stakeholders. This will help to ensure the validity of data or to acquire new information that is crucial to an improved NEPA process.

- **Establish A "Lead Agency" for Each Project**

The Roundtable agrees with the recommendations to establish a "lead agency" for each project. We believe that this recommendation could be enhanced by a clear charge that the lead agency coordinate the NEPA-related proceedings of the various governmental entities, including: joint planning processes; joint environmental research and studies; joint public hearings (except where otherwise provided by statute); and joint environmental impact statements.

All participating agencies should be subordinate to the lead agency.

Further, the lead and all participating agencies must be focused on the fact that NEPA is a *process* statute. EPA, in particular, has a history of treating NEPA as a proxy for a permitting regime and has sought to inject

inappropriate considerations into the process. Congress needs to state clearly that NEPA is a planning and a review process and that agencies' input should reflect this fact.

- **Evaluate EPA's NEPA Process Role and Eliminate in States With Primacy for the Clean Air and Clean Water Acts**

The EPA reviews NEPA documents prepared by other federal agencies under the authority of Section 309 of the Clean Air Act. The need for EPA to have a role in the NEPA process should be examined, especially in states with primacy for the Clean Air Act and Clean Water Act.

In primacy states, EPA's NEPA review role is redundant and does not add any additional measure of environmental protection. EPA's oversight role in monitoring these permit programs provides sufficient federal regulatory review and control.

COMMENTS ON GROUP 7 RECOMMENDATIONS: GRANTING ADDITIONAL AUTHORITY FOR CEQ

- **Create a NEPA "Ombudsman" Within CEQ**

The Roundtable supports the recommendation that the CEQ create a NEPA Ombudsman with decision making authority to resolve conflicts with the NEPA process.

- **Make CEQ Responsible for Controlling NEPA-Related Costs**

The Roundtable endorses the recommendation that CEQ assess NEPA costs and bring recommendations to Congress for cost ceiling policies.

COMMENTS ON GROUP 8 RECOMMENDATIONS: CLARIFYING THE MEANING OF "CUMULATIVE IMPACTS"

- **Clarifying the Meaning of "Cumulative Impacts"**

The Roundtable recognizes the importance of adding a provision to NEPA that would establish that an agency's assessment of existing environmental conditions would serve as the methodology to account for past actions.

- **Clarify Types of Future Actions Appropriate for Cumulative Impact Analysis**

The Roundtable agrees with the instruction that CEQ prepare regulations that would modify the existing language in 40 CFR 1508.7 to focus analysis of future impacts on concrete proposed actions rather than actions that are “reasonably foreseeable.”

COMMENTS ON GROUP 9 RECOMMENDATIONS: STUDIES

- **Evaluate How/Whether NEPA and Other Environmental Laws Interact**

The Roundtable strongly supports the recommendation that CEQ be directed to conduct a study to evaluate how NEPA interacts with the body of environmental laws passed since its enactment. The focus here should be on minimizing the duplication in the evaluative processes of NEPA and these environmental laws.

- **Provide Sufficient Federal NEPA Staffing, Resources and Training**

In Western states, federal NEPA actions can have tremendous economic consequences. Therefore, local and state governments feel compelled to participate. Unfortunately, some of these entities are ill-prepared because of the lack of knowledge, training, understanding and/or resources.

In addition to the recommendation that CEQ investigate and recommend measures necessary to recruit and retain experienced staff, the Roundtable seeks additional support for training opportunities, resources, and technical assistance that should be provided to local and state entities so they can be more effective participants in the NEPA process.

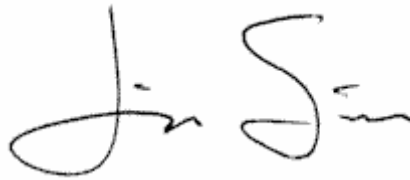
- **NEPA Interaction With State “Mini-NEPAs”**

The Roundtable agrees with the recommendation that calls for the examination of how and whether NEPA and the body of state mini-NEPAs and similar environmental laws passed since NEPA’s enactment interact. Eliminating the amount of duplication and overlap in the environmental evaluation process would strengthen the NEPA process.

Conclusion:

Thank you again for this opportunity to comment on the House Resources Committee's "Initial Findings and Draft Recommendations" NEPA Report. We very much appreciate your fortitude in taking on this most difficult of issues. If our members can be of assistance in providing more information, we would welcome the opportunity to do so.

Best regards,

A handwritten signature in black ink, appearing to read "Jim Sims". The signature is fluid and cursive, with the first name "Jim" and last name "Sims" clearly distinguishable.

James T. Sims
Executive Director

cc: Vice President Dick Cheney
House Resources Committee Chair Richard Pombo
House Resources Committee NEPA Task Force Members
Senate Energy Committee Members
Interior Secretary Gale Norton
Energy Secretary Samuel Bodman
BLM Director Kathleen Clarke
CEQ Chairman Jim Connaughton
Western Governors' Association
Western Governors
Western Congressional delegations
House Resources Committee Staff

The Roundtable is a non-profit business trade association comprised of CEOs and senior executives of organizations doing business in the Western United States. Our member companies are involved in a broad range of industries, including agricultural products, accounting, chemicals, coal, construction and construction materials, conventional and renewable energy production, energy services,

engineering, financial services, internet technologies, manufacturing, mining, oil and gas, pharmaceuticals, pipelines, telecommunications, and public and investor-owned utilities. We work for a common sense, balanced approach to economic development and environmental conservation, and we support public policies that encourage economic growth, opportunity and freedom of enterprise.